NO. 93-933

Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM 1993

MARITIME OVERSEAS CORPORATION
AND ATLANTIA TANKER CORPORATION,
Petitioners,

VERSUS

HAE WOO YOUN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

Gerard T. Gelpi
Counsel of Record
C. Gordon Starling, Jr.
G. Beauregard Gelpi
Gelpi, Sullivan, Carroll & Gibbens
430 Notre Dame Street
New Orleans, Louisiana 70130
Telephone: (504) 524-9714

Attorneys for Petitioners, Maritime Overseas Corporation and Atlantia Tanker Corporation

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Whether the general maritime law allows double recovery to a seaman, specifically, whether a seaman can recover both future pain and suffering and past and future mental anguish in addition to damages for past and future loss of enjoyment of life, disability and disfigurement, as was allowed in the instant case?

2. Whether a Jones Act seaman can recover prejudgment interest, as was allowed in the instant case, when the award of such is contrary to recent pronouncements of this Court in both Jones Act and FELA cases?

3. Whether a seaman can be awarded past and future lost of found when, as in the instant case, there is absolutely no evidence of the actual cost of his food or clothing.

LIST OF PARTIES

The following are the parties to this proceeding:

1. Hae Woo Youn, respondent;

2. Maritime Overseas Corporation, petitioner;*

3. Atlantia Tanker Corporation, petitioner;**

4. Assuranceforeningen GARD, defendant.

---

* Pursuant to Supreme Court Rule 29.1, petitioner, Maritime Overseas Corporation, states that it has no parent or non-wholly owned subsidiaries.

** Pursuant to Supreme Court Rule 29.1 petitioner, Atlantia Tanker Corporation, states it is part of a group of companies which comprises the Overseas Ship Holding Group, Inc., 114 Avenue of the Americas, New York, NY 10036.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

DECISIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. *MILES v. APEX MARINE CORP.* PROVIDES THE APPLICABLE ANALYSIS TO RESOLVE THE ISSUES IN THIS PETITION 6

II. THE COURT BELOW ERRED AS A MATTER OF LAW IN ALLOWING YOUN DOUBLE RECOVERY FOR PAIN AND SUFFERING AND MENTAL ANGUISH, AS WELL AS LOSS OF ENJOYMENT OF LIFE, DISABILITY AND DISFIGUREMENT 9

TABLE OF CONTENTS (continued)

Page

III. THE RECOVERY OF PREJUDGMENT INTEREST BY A JONES ACT SEAMAN IS PRECLUDED BY THIS COURT'S DECISION IN *MILES V. APEX MARINE CORP.* 13

IV. NO EVIDENCE IN THE RECORD SUPPORTS AN AWARD FOR PAST AND FUTURE LOSS OF FOUND 19

CONCLUSION 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases	Page
Alexandervich v. Gallagher Bros. Sand & Gravel Corp., 298 F.2d 918 (2d Cir. 1961)	21,22
Anglada v. Tidewater, Inc., 752 F.Supp. 722 (E.D. La. 1990)	17
Bennett v. Atchison, T&S.F.R. Co. 187 Iowa 897, 174 N.W. 805 (1919)	18
Domangue v. Penrod Drilling Co., 748 F.2d 999 (5th Cir. 1984)	13,14
Dugas v. Kansas City So. Ry. Lines, 473 F.2d 821 (5th Cir.), *cert. denied*, 414 U.S. 823, 94 S.Ct. 124 (1973)	11
Grow v. Oregon Short Line R. Co., 47 Utah 26, 150 P. 970 (1915)	18
Hanson v. Reiss S.S. Co., 184 F.Supp. 545 (D. Del. 1960)	11
Harnesk v. Carnival Cruise Lines, 1991 WL 329584 (S.D. Fla. 1991)	12
Jordan v. Travelers Ins. Co., 257 La. 995, 245 So.2d 151 (1971)	20,23

TABLE OF AUTHORITIES (continued)

Cases **Page**

Melancon v. Petrostar Corp., 762 F.Supp. 1261 (W.D. La. 1991) 17,18

Michel v. Total Transp., Inc., 957 F.2d 186 (5th Cir. 1992) 16

Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317 (1990) 6-9,13,16-19,

Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir.), *cert. denied*, __U.S.__, 114 S.Ct. 304 (1993) 17

Monessen S.W. Ry. Co. v. Morgan, 486 U.S. 330, 108 S.Ct. 1837 (1988) 14,18,19

Murray v. Anthony J. Bertucci Constr. Co., Inc., 958 F.2d 127 (5th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 190 (1992) 16,17

The OSCEOLA, 189 U.S. 158, 23 S.Ct. 483 (1903) 15

Panama R.R. Co. v. Johnson, 264 U.S. 375, 44 S.Ct. 391 (1924) 14,15

Robinson v. Plimsoll Marine, Inc., 460 F.Supp 949 (E.D. La. 1978) 21

TABLE OF AUTHORITIES (continued)

Cases **Page**

Sanford Bros. Boats, Inc. v. Vidrine, 412 F.2d 958 (5th Cir. 1969) 13

Stiles v. K-Mart Corp., 597 So.2d 1012 (La. 1992) .. 20,23

Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274 (5th Cir. 1985), *rev'd on other grounds*, 474 U.S. 816, 106 S.Ct. 60 (1986) 20,21

Theriot v. J. Ray McDermott & Co., Inc., 742 F.2d 877 (5th Cir. 1984) 13

Williams v. Reading & Bates Drilling Co., 750 F.2d 487 (5th Cir. 1985) 14

Youn v. Maritime Overseas Corp., 605 So.2d 187 (La. App. 5th Cir.), *writ granted in part*, 609 So.2d 239 (La.), *writ denied in part*, 609 So.2d 240 (La. 1992), *cert. denied*, 113 S.Ct. 2342, *reh'g denied*, 113 S.Ct. 3022, *rev'd*, 623 So.2d 1257 (La. 1993) 1,4,5,9,12,19,20,23,24

Statutes

28 U.S.C. §2101(c) 2

45 U.S.C. §51 7,9,11,13,14,18,19

46 U.S.C. §688 2,6-9,11,13-19

TABLE OF AUTHORITIES (continued)

Treastises, Periodicals and Texts **Page**

BLACK'S LAW DICTIONARY 461 (6th ed. 1990) . . . 10

BLACK'S LAW DICTIONARY 985-86 (6th ed. 1990) . 10

BLACK'S LAW DICTIONARY 1109 (6th ed. 1990) . . 10

G. Gilmore & C. Black, Jr., THE LAW OF ADMIRALTY, (2d ed. 1975) 15

2 M. MINZER, ET AL., DAMAGES IN TORT ACTIONS (1986) 10,11

D. Normann, HAS FOUND BEEN LOST? AN ANALYSIS OF A SELDOM UTILIZED CONCEPT IN THE MARITIME LAW, 30 Loy. L. Rev. 875 (1985) 21

DECISIONS BELOW

The decision of the Louisiana Court of Appeal for the Fifth Circuit is reported at 605 So.2d 187 (La. App. 5th Cir. 1992) and is reproduced in Appendix E, pp. 18a-69a. The decision of the Supreme Court of Louisiana is reported at 623 So.2d 1257 (La. 1993) and is reproduced in Appendix A, pp. la-13a. On October 7, 1993, the Louisiana Supreme Court denied the application for rehearing filed by Maritime Overseas Corporation and Atlantia Tanker Corporation (collectively "MOC"), which order is reproduced in Appendix B, pp. 14a.

MOC moved the Louisiana Supreme Court for an order staying the execution and enforcement of the judgment pending its petition for *cetiorari* to this Court, which the Louisiana Supreme Court denied on October 11, 1993, which order is reproduced in Appendix C, p. 15a. MOC subsequently filed an application for stay of the enforcement of the judgment with this Court, which the Honorable Antonin Scalia denied on October 14, 1993, which order is reproduced in Appendix D, pp. 16a-17a.

JURISDICTION

On September 3, 1993, the Supreme Court of Louisiana reversed the judgment of the Louisiana Court of Appeal, Fifth Circuit and reinstated the district court's award to Hae Woo Youn of past and future loss of found in the amount of $41,222.00; past and future physical pain and suffering in the amount of $500,000.00; past and future mental anguish and loss of enjoyment of life in the amount of $500,000.00; and disability and disfigurement in the amount of $400,000.00. On October 7, 1993, that

court denied rehearing. MOC now files its petition for a writ of *certiorari*, pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statute is involved in this petition:

46 U.S.C. §688(a) (The Jones Act):

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right to trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such a seaman may maintain an action for damages at law with the right to trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

STATEMENT OF THE CASE

On July 10, 1989, Youn filed suit against Atlantia Tanker Corporation and Maritime Overseas Corporation (collectively "MOC") in the 23rd Judicial District Court, Parish of St. James, State of Louisiana, seeking damages for injuries sustained on May 23, 1989, when a lifting line struck his left leg while he was employed as boatswain aboard the M/T ATLANTIA, a Liberian oil tanker owned by Atlantia Tanker Corporation. Youn alleged negligence under the Jones Act (46 U.S.C. §688) and unseaworthiness under the general maritime law. Youn received meals and clothing while aboard the ship, and he sued also to recover, in part, compensation for the meals and clothing, his "found," he would have received but for his accident. MOC answered the petition and requested a trial by jury.

Youn moved to strike MOC's jury demand and also filed an amended petition designating his suit as "an admiralty or general maritime claim" pursuant to Louisiana Code of Civil Procedure Article 1732(6). The district court struck MOC's jury demand, MOC filed for supervisory and remedial writs, which were denied, (Appendix I, pp. 75a-77a.) MOC filed for a writ of *certiorari* to the Louisiana Supreme Court which was denied on April 16, 1990. (Appendix J., p. 78a.) Youn later amended the suit to name as an additional defendant, Assuranceforeningen GARD, the insurer of MOC.

On September 28, 1990, the matter was tried to the court. There is absolutely no evidence in the record as to the value per day of the meals and clothing provided to Youn. Instead, plaintiff's counsel had his economist calculate loss of found assuming a *per diem* rate of $10.00. No evidence whatsoever supports a $10.00 per day

allowance for found. On December 17, 1990, the district court rendered judgment in favor of Youn and against all defendants, *in solido,* awarding damages as follows: future medical expenses $40,000.00; past loss of net earnings — $22,642.00; future loss of net earnings — $200,000.00; past loss of found — $3,748.00; future loss of found — $37,474.00; past physical pain and suffering — $200,000.00; future physical pain and suffering — $300,000.00; past mental anguish and loss of enjoyment of life — $200,000.00; future mental anguish and loss of enjoyment of life — $300,000.00; and disability and disfigurement — $400,000.00. (Reasons for Judgment, Appendix L, pp. 82a-92a.)

All defendants filed a timely motion for suspensive appeal which the court granted. Youn did not answer the appeal.

On July 27, 1992, the Louisiana Court of Appeal for the Fifth Circuit concluded the district court abused its discretion with regard to the amount of general damages awarded to plaintiff, which the court of appeal reduced to $600,000.00. The court of appeal also reversed the district court's award of past and future loss of found, concluding plaintiff failed to produce any evidence to support an award for that amount of found or how many days Youn was entitled to receive meals and clothing. *Youn v. Maritime Overseas Corp.,* 605 So.2d 187, 192 (La. App. 5th Cir.) (hereinafter "*Youn I*," App. E., p. 60a.) The appellate court also reversed the district court's award of pre-judgment interest on future damages. *Id.* at 204, App. E., p. 52a. The court of appeal affirmed the other findings of the district court.

Youn and MOC both petitioned the court of appeal

for rehearing which petitions were denied on October 19, 1992. (Appendix M, p. 93a.)

On December 21, 1992, the Louisiana Supreme Court denied MOC's application for a writ of *certiorari* and/or review concerning the denial of trial by jury, the finding of liability, the excessiveness of the general damage award, the award of future medical expenses, and the award of past loss earnings. 609 So.2d 240, Appendix F, p. 70a. On that same date, the Louisiana Supreme Court granted Youn's application for writ of *certiorari* and/or review concerning only the court of appeal's reduction of general damages and disallowance of found. 609 So.2d 239, App. F, pp. 71a-72a.

MOC petitioned this Court for *certiorari* contending the district court's denial of MOC's jury request discriminated against maritime defendants in Louisiana state courts in violation of the Equal Protection Clause and the Supremacy Clause of the United States Constitution. This Court denied MOC's petition on May 17, 1993. 113 S.Ct. 2342, Appendix G, p. 73a. On June 21, 1993, this Court denied MOC's Petition for Rehearing of Order Denying Writ of *Certiorari*. 113 S.Ct. 3022, Appendix H, p. 74a.

On September 3, 1993, the Louisiana Supreme Court partially reversed the court of appeal and reinstated the district court's award of general damages and past and future loss of found. (*Youn II,* 609 So.2d 1257 (La. 1993), App. A., pp. 1a - 13a.) MOC sought rehearing of the Louisiana Supreme Court's September 3 decision, and raised for the first time the purely legal issues regarding double recovery and prejudgment interest. The Louisiana Supreme Court denied the motion for rehearing on October 7, 1993. (App. B, p. 14a)

REASONS FOR GRANTING THE WRIT

I. *MILES v. APEX MARINE CORP.* PROVIDES THE APPLICABLE ANALYSIS TO RESOLVE THE ISSUES IN THIS PETITION

In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990), this Court held recovery for loss of society was not available under the general maritime law to any beneficiary of a true seaman and denied recovery of future loss of earnings to the estate of a deceased seaman, even if a general maritime law survival action exists. The Court's decision made it abundantly clear that whether he proceeds under the Jones Act or the general maritime law, a seaman's (or his beneficiaries') recovery is limited to those damages provided by the statute enacted specifically to deal with seaman's rights — the Jones Act, 46 U.S.C. §688. The *Miles* decision provides the analytical framework within which the award of damages to Youn and the award of prejudgment interest must be considered.

The *Miles* Court reviewed the legislative history of the Jones Act to determine whether the estate of a seaman could recover non-pecuniary damages:

> Enacted in 1920, the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA [Federal Employers' Liability Act, 45 U.S.C. §51, *et. seq.*] See 46 U.S.C. §688. FELA recites only that employers shall be liable in "damages" for the injury or death of one protected under the Act. 45 U.S.C.

> §51. In *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913), however, the Court explained that the language of the FELA wrongful death provision is essentially identical to that of Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846), the first wrongful death statute. Lord Campbell's Act also did not limit explicitly the "damages" to be recovered, but that Act and the many state statutes that followed it consistently had been interpreted as providing recovery only for pecuniary loss. *Vreeland*, supra, at 69-71. The Court so construed the FELA. *Id.*
>
> When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. See *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979). There is no recovery for loss of society in a Jones Act wrongful death action.

Miles, 498 U.S. at 32, 111 S.Ct. at 325. Accordingly, as the *Miles* Court recognized, the judicial interpretation of the FELA prior to the enactment of the Jones Act governs the interpretation of the Jones Act. Additionally, interpretations of the FELA should be considered in interpreting similar issues arising under the Jones Act.

The *Miles* Court also was quite clear in its reliance upon statutory guidelines for judge-made maritime law. The Court stated:

> Admiralty is not created in a vacuum; legislation has always served as an important source of both

> common law and admiralty principles.
>
> * * *
>
> The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. Congress, in the exercise of its legislative powers, is free to say "this much and no more." An admiralty court is not free to go beyond those limits.

Id. at 24, 111 S.Ct. at 321 (citations omitted).

Questioning the license of courts to fill gaps left by statutes, the Court noted:

> But in an area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.
>
> * * *
>
> Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation of damages as well.

Id. at 31-32, 111 S.Ct. at 325. The guidelines set forth by the Court in *Miles* limit the award of damages in any action involving a Jones Act seaman, whether the vehicle for recovery be the Jones Act or a general maritime law remedy for unseaworthiness. As Justice O'Connor stated:

> Because this case involves the death of a seaman, we must look to the Jones Act.
>
> * * *

> Congress has limited the survival right for seaman's injuries resulting from negligence. As with loss of society in wrongful death actions, this forecloses the more expansive remedies in a general maritime action founded on strict liability.
>
> * * *
>
> Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under the general maritime law.

Id. at 36, 111 S.Ct. at 328.

Thus, the damages available under the general maritime law are limited to those available under the Jones Act, which in turn incorporated the damage limitations of the FELA and the related jurisprudence existing prior to 1920. As set forth below, neither loss of enjoyment of life, as a separate category of damages from pain and suffering and mental anguish, nor prejudgment interest are recoverable under the FELA. Thus, these damages are not recoverable under the Jones Act, and therefore, pursuant to *Miles,* such are not recoverable by a Jones Act seaman under any theory of recovery.

II. THE COURT BELOW ERRED AS A MATTER OF LAW IN ALLOWING YOUN DOUBLE RECOVERY FOR PAIN AND SUFFERING AND MENTAL ANGUISH, AS WELL AS LOSS OF ENJOYMENT OF LIFE, DISABILITY AND DISFIGUREMENT.

The Louisiana Supreme Court reinstated Youn's award of damages for physical pain and suffering ($500,000.00), mental anguish and loss of enjoyment of life ($500,000.00), and disability and disfigurement ($400,000.00). (623 So.2d at 1261, App. A, p. 10a-11a.) It is

an error of law to award separate recovery for each of the foregoing items of damages, as such comprises an improper cumulation or double recovery of physical pain and suffering and mental anguish. Pain and suffering is a "term used to describe not only physical discomfort and distress, but also mental and emotional trauma which are recoverable as elements of damage in torts." BLACK'S LAW DICTIONARY 1109 (6th ed. 1990). Mental anguish includes "both the resultant mental sensation of pain and also the accompanying feelings of distress, fright and anxiety. As an element of damages, mental anguish implies a relatively high degree of mental pain and distress; it is more than mere disappointment, anger, worry, resentment or embarrassment, although it may include all of these, and it includes mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation." BLACK'S LAW DICTIONARY 985-86 (6th ed. 1990).

Disability has been defined as "the absence of competent, physical, intellectual, or moral powers; impairment of earning capacity; loss of physical function that reduces efficiency; or inability to work." BLACK'S LAW DICTIONARY 461 (6th ed. 1990). Thus an award for disability encompasses two areas of an individual's life: the impairment or inability to engage in employment activities and the impairment or inability to engage in recreational activities.

An award for loss of enjoyment of life purports to compensate an injured person for his inability to lead "what would have been a normal life style in the absence of injury." 2 M. MINZER, ET AL., DAMAGES IN TORT ACTIONS §8.01, pp. 8-2 - 8-4 (1986). The basis for recovery of loss of enjoyment of life ranges from extreme disfigure-

ment to chronic headaches and can arise from any consequence which adversely affects the injured party's enjoyment of life. *Id.* at pp. 8-5 - 8-8. Inconvenience, humiliation, loss of ability to engage in pastimes, and loss of the right to be a normal human being are synonymous with loss of enjoyment of life. *Id.* at p. 8-8.

In *Dugas v. Kansas City So. Ry. Lines*, 473 F.2d 821 (5th Cir.), *cert. denied*, 414 U.S. 823, 94 S.Ct. 124 (1973), the Fifth Circuit reversed the award of damages to an injured rail yard worker on the grounds that the district court improperly had instructed the jury to consider the loss of enjoyment of life and the loss of vitality suffered by the plaintiff in awarding damages. The court observed that the FELA created federal substantive rights protected by federal law which governed the propriety of jury instructions. *Id.* at 826-27. The court concluded an award for loss of enjoyment of life would amount to a double recovery for pain and suffering.

> [T]he effect of injuries upon the normal pursuits and pleasures of life is an included item, not a separate one, that is, the normal pursuits and pleasures of life are to be included as a part of pain, suffering and inconvenience. *It is not a factor to be separately measured as an independent ground for damages.*

Id. at 827 (emphasis added). The court also concluded loss of vitality was an included element of pain, suffering and inconvenience.

In *Hanson v. Reiss S.S. Co.*, 184 F. Supp. 545 (D. Del. 1960), the district court concluded a Jones Act seaman was not entitled to a separate award for "loss of life's pleasures," which should be included in the award for pain

and suffering. Likewise, in *Harnesk v. Carnival Cruise Lines*, 1991 WL 329584 (S.D. Fla. 1991), the district court concluded that loss of enjoyment of life was an element of pain and suffering.

The Louisiana Supreme Court erred as a matter of law in permitting Youn, a Jones Act seaman, to recover for physical pain and suffering and mental anguish, as well as for loss of enjoyment of life, disability and disfigurement. Loss of enjoyment of life is not a separate compensable loss independent of pain and suffering. The lower courts' awards for past and future loss of enjoyment of life should be reversed and those awards disallowed as duplicative of the awards for past and future pain and suffering.

The Louisiana Supreme Court also improperly allowed damages for disability and disfigurement, which cumulated other damage awards. Youn's damages for disability were compensated by: (a) the awards for past and future loss of earnings, which represent his inability to engage in employment activities; and (b) the awards for pain and suffering which include mental anguish and the loss of enjoyment of life, which flow from his disability/inability to engage in recreational activities.

Lastly, damages for disfigurement conceivably compensated Youn for his public humiliation, embarrassment, and shame concerning the appearance of his left leg. Yet, disfigurement has already been compensated through the awards of pain and suffering.

MOC submits the Court should grant *certiorari* to eliminate the double recovery of Youn for disability and for pain and suffering, mental anguish and loss of earning

capacity, and for disfigurement and for pain and suffering. Clearly an award for pain and suffering includes loss of enjoyment of life. Loss of enjoyment of life is not a separate element of damages under either the FELA or the Jones Act. Additionally, disfigurement is a component of mental anguish and pain and suffering, for which Youn already has been compensated. Lastly, Youn's disability is reflected in the awards for loss of earnings, mental anguish and pain and suffering. MOC respectfully requests the Court to disallow the awards for loss of enjoyment of life, disability, and disfigurement, as those damages amount to a double recovery.

III. THE RECOVERY OF PREJUDGMENT INTEREST BY A JONES ACT SEAMAN IS PRECLUDED BY THIS COURT'S DECISION IN *MILES V. APEX MARINE CORP.*

The Jones Act, 46 U.S.C. §688, has been interpreted as providing a seaman with an election between two negligence actions — an action in admiralty or an action at law. MOC disputes that this interpretation is correct, as will be discussed below. However, even were this interpretation correct, a Jones Act seaman is not entitled to recover prejudgment interest, whether the action is brought "in admiralty" or "at law."

Initially, it seems clear that prejudgment interest is not recoverable in an action under the Jones Act brought at law. *Theriot v. J. Ray McDermott & Co., Inc.*, 742 F.2d 877, 883 (5th Cir. 1984); *Domangue v. Penrod Drilling Co.*, 748 F.2d 999, 1000 (5th Cir. 1984); *Sanford Bros. Boats, Inc. v. Vidrine*,. 412 F.2d 958, 972 (5th Cir. 1969). This

holding is based on the incorporation into the Jones Act of the limitations on damages recoverable under the Federal Employers Liability Act (FELA), 45 U.S.C. §51. This Court has held that prejudgment interest is not available under the FELA. *Monessen S.W. Ry. Co. v. Morgan,* 486 U.S. 330, 108 S.Ct. 1837 (1988).

Despite consistent rulings that prejudgment interest is not recoverable in an action under the Jones Act brought at law, some courts have held that prejudgment interest is recoverable in a Jones Act action brought in admiralty. The Fifth Circuit has held that when a Jones Act action is brought in admiralty and is tried to a judge, not a jury, the recovery of prejudgment interest is within the sound discretion of the trial judge. *Williams v. Reading & Bates Drilling Co.,* 750 F.2d 487, 491 (5th Cir. 1985); *Domangue,* 748 F.2d at 1000.

MOC submits it is improper to make a recovery available to a Jones Act seaman in an action brought in admiralty which exceeds that available to a Jones Act seaman in a similar action brought at law under the Jones Act. A negligence action brought in admiralty under the Jones Act, if such action exists, is at best a judicially-created action. The Jones Act, by its express terms, gives seamen a right of action at law. "Any seamen who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury ..." 46 U.S.C. §688(a). The statute itself does not mention in any way an action at admiralty.

However, in 1924, this Court held the Jones Act permits a seaman to assert his action on the admiralty side of

the court. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391 (1924). This holding has been recognized by some of the leading admiralty commentators as pure judicial invention. G. Gilmore & C. Black, Jr., THE LAW OF ADMIRALTY, §6-22, p.340 (2d ed. 1975). In fact, the authors seem surprised that the holding has not been questioned. *Id.* Prior to the passage of the Jones Act in 1920, a seaman *had no action for the negligence* of the master or the crew. He did, however, have an action against the vessel and her owner for unseaworthiness under the general maritime law. *The OSCEOLA*, 189 U.S. 158, 175, 23 S.Ct. 483, 487 (1903).

Thus, no *negligence* action existed which could be brought on the admiralty side of the court. The *Panama* Court construed the language of the Jones Act as allowing a seaman to bring a negligence action on the admiralty side of the court, notwithstanding the fact that no such action preexisted the Jones Act (as recognized by *The OSCEOLA*, *supra*, but apparently not realized by the *Panama* Court) and that no such action is provided for in the statute itself. The *Panama* Court misinterpreted the Jones Act as allowing a negligence action to be brought at law or in admiralty. The Jones Act merely creates a negligence action at law, not in admiralty. The Jones Act action brought in admiralty, though of longstanding recognition, is a judicially-created cause of action, concocted by this Court in 1924 in order to enable the Jones Act to pass a possible constitutional challenge should the Jones Act be viewed as divesting the federal courts of jurisdiction over certain admiralty causes of action. By creating a Jones Act cause of action in admiralty, the *Panama* Court avoided this challenge.

However, the *Miles* Court has held that the damages available in a judicially-created action under the general maritime law cannot exceed the damages available under the Jones Act. Where Congress has acted in creating a remedy, the courts are not free to expand those remedies. "[L]egislation sends other signals to which an admiralty court must attend ... Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits." *Miles*, 498 U.S. at 24, 111 S.Ct. at 321. The Court recognized that Congressional statutes "both direct and delimit our actions." *Id.* at 27, 111 S.Ct. at 323. Further, the Court recognized that it must defer to Congress. "We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them" *Id.* at 36, 111 S.Ct. at 327. Finally, the Court acknowledged "It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault then Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33, 111 S.Ct. at 326.

The Fifth Circuit has held that the *Miles* deference to legislation and mandate for uniformity bars the claim under the general maritime law for loss of consortium brought by a spouse of an injured seaman. *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992); *Murray v. Anthony J. Bertucci Constr. Co., Inc.*, 958 F.2d 127 (5th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 190 (1992). In *Murray*, the Fifth Circuit noted the *Miles* Court's strong deference to Congress and federal maritime legislation.

"We are required, therefore, to look to the Jones Act to consider the scope of the damage award for a seaman's injury." *Murray*, 958 F.2d at 131.

The United States Court of Appeals for the Sixth Circuit has held that the *Miles* decision bars recovery of punitive damages by an injured seaman. *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, __U.S.__, 114 S.Ct. 304 (1993). In so holding, the *Miller* court recognized that courts must look to federal legislation when determining the damages available to a seaman.

Several U.S. District Courts have considered the issue of whether the *Miles* decision bars a claim for prejudgment interest brought by a Jones Act seaman. These courts have held that *Miles* does not preclude prejudgment interest, primarily on one of two grounds: (1) the "snapshot in time" argument espoused in *Anglada v. Tidewater, Inc.*, 52 F.Supp. 722 (E.D. La. 1990) or the "substantive" argument set forth in *Melancon v. Petrostar Corp.*, 762 F.Supp. 1261 (W.D. La. 1991).

The "snapshot in time" argument posits that since awards of prejudgment interest were available on general maritime law claims prior to the enactment of the Jones Act in 1920, the passage of the Jones Act, with its limitations on recoverable damages, thus does not affect the recovery of prejudgment interest. *Anglada*, 752 F.Supp. at 725-26. This argument fails. The existence of the right to recover prejudgment interest prior to the passage of the Jones Act supports MOC's arguments. Congress is presumed to be aware of existing law when it passes legislation. *Miles*, 498 U.S. at 32, 111 S.Ct. at 325. Prior to 1920,

prejudgment interest was not recoverable under the FELA, which was enacted in 1908. See *Bennett v. Atchison, T&SF.R. Co.*, 187 Iowa 897, 903-04, 174 N.W. 805, 807 (1919); *Grow v. Oregon Short Line R. Co.*, 47 Utah 26, 29, 150 P. 970, 971 (1915). As recognized by this Court, "the federal and state courts have held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA." *Monessen*, 486 U.S. at 338, 106 S.Ct. at 1844 (citations omitted). Congress incorporated the FELA into the Jones Act. The failure of the Jones Act expressly to allow prejudgment interest requires the application of the FELA bar to recovery of prejudgment interest, and not the application of the general maritime law rule regarding prejudgment interest. If Congress wanted seamen to recover that item of damages, it easily could have included language to that effect in the Jones Act.

In *Melancon*, the district court distinguished an award for loss of consortium, a cause of action unavailable under the Jones Act and therefore clearly barred under the general maritime law by *Miles*, from an award of prejudgment interest, which it concluded was not a "substantive cause of action." *Melancon*, 762 F.Supp. at 1263. This argument is contrary to this Court's jurisprudence. In *Monessen*, this Court held that prejudgment interest is substantive in nature. *Monessen*, 468 U.S. at 336, 108 S.Ct. at 1843 (1988) Clearly, since the Jones Act incorporates the FELA, prejudgment interest under the Jones Act must also be substantive. Considering this, the *Melancon* holding erroneously strays from the *Miles* analysis.

Under the reasoning of *Miles*, if an item of damages

is not recoverable under the Jones Act, the seaman (or his beneficiaries) cannot recover it under the general maritime law. When viewed in these straight-forward terms, it becomes obvious that, logically, damages which are not recoverable under the Jones Act in an action at law should not be recoverable under the Jones Act in an action in admiralty (if such action exists). Inasmuch as the FELA prohibits an award for prejudgment interest, *Monessen,* the Jones Act which incorporates the FELA, prohibits an award of prejudgment interest. Thus, prejudgment interest likewise is not recoverable by a seaman under the general maritime law.

IV. NO EVIDENCE IN THE RECORD SUPPORTS AN AWARD FOR PAST AND FUTURE LOSS OF FOUND.

The district court awarded Youn past and future loss of found at a rate of $10.00 per day based on the trial court's inference - without any evidence to support such inference - that the award represented the daily cost of food and clothing MOC provided to Youn while aboard the ATLANTIA. The Louisiana Fifth Circuit set aside the district court's award for loss of found, properly concluding plaintiff failed to offer any evidence as to the value, per day, of meals and clothing, or as to the number of days Youn received, and in the future would receive, meals and clothing aboard the ATLANTIA. *Youn I,* 605 So.2d at 208, App. E,p. 60a. The appellate court also correctly determined it was improper for the district court to take judicial notice of the rate and amount of loss of found, as those facts were disputed at trial. *Id.* at 207, App. E, p. 60a.

The Louisiana Supreme Court reinstated the district court's award but did not address the impropriety of the district court taking judicial notice of the rate and amount of found. Instead, the Louisiana Supreme Court, relying on *Jordan v. Travelers Ins. Co.*, 257 La. 995, 245 So.2d 151 (1971) and *Stiles v. K-Mart Corp.*, 597 So.2d 1012 (La. 1992) for the proposition that a court can infer *from the evidence* the amount of the loss of found, concluded:

> Here, the trial judge set the award for loss of found at $10 per day on the basis of evidence that plaintiff's employer had provided meals, lodging and clothing to him daily and the trial court's inference that these daily items would cost at least that amount. Moreover, awards for loss of found in other reported decisions have far exceeded that daily amount. We conclude that the award of $10 per day was supported and should have been upheld.

Youn II, 623 So.2d at 1262, App. A, p. 13a.

MOC requests this Court to review the decision of the Louisiana Supreme Court in light of the general maritime law requirement that the evidence support the amount of an award. While loss of found compensates a seaman for his loss of food and lodging, and thus may sometimes be confused with maintenance, which compensates a seaman for food and lodging until the seaman attains maximum medical cure, recovery for loss of found requires proof of the value of those services. Mere guesses cannot suffice to support an award. *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1288 (5th Cir. 1985)(reversing the award for economic loss because the

base salary supporting the award was a "guess"), *rev'd on other grounds,* 474 U.S. 816, 106 S.Ct. 60 (1986).

One commentator observed:

> The tendency to confuse or merge maintenance and found clearly has crept into the jurisprudence. Hence, there is a necessity for clarification to demonstrate the distinctions between the two concepts....Maintenance is generally thought of in somewhat established and "fixed" figures. For example, $8.00 or $15.00 per day. But there would be no similar "pre-set" figure for the value of found.

D. Normann, HAS FOUND BEEN LOST? AN ANALYSIS OF A SELDOM UTILIZED CONCEPT IN THE MARITIME LAW, 30 Loy. L. Rev. 875, 880 (1985). Maintenance is generally determined by one of three methods: the provisions of a union contract, custom within a given port, or the actual value of food and lodging aboard the vessel. *Robinson v. Plimsoll Marine, Inc.,* 460 F.Supp 949, 950 (E.D. La. 1978).

One reported decision comprises the whole of the jurisprudence counsel for MOC could locate concerning the actual calculation for loss of found. In *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.,* 298 F.2d 918 (2d Cir. 1961), the Second Circuit reversed the trial court's award for loss of found of $8.00 per day (the daily maintenance rate under the union contract) from the date of maximum medical cure through the date of judgment because that amount was not proved by plaintiff. The trial court had awarded plaintiff two-thirds of the daily rate to reflect

Alexandervich's work schedule: two weeks aboard the vessel, one week at home. *Id.* at 921, n. 3. The court of appeals rejected the award of found based on the maintenance rate and concluded an award for found can be made only when actual food and lodging expenses are incurred. *Id.* at 921. Because Alexandervich maintained a home on shore for his family while he was employed aboard the vessel, he was not entitled to found based on the cost of his lodging at home. *Id.* at 922. The Second Circuit reasoned such an award was not an incentive for plaintiff to work aboard the vessel, but was merely for the employer's convenience. Plaintiff also failed to prove the actual cost of his food on shore. However, the court concluded plaintiff could recover $2.07 per day for his meals (part of found), based upon the union contract — which was in evidence.

In this instance, plaintiff presented no evidence concerning the actual cost of food and clothing aboard the ATLANTIA, or his costs when he was at home. The district court accepted the calculations made by Youn's economist. Those calculations, however, were not based on any evidence, but rather were based on assumptions posited by *Youn's counsel.* (R. Vol. 9, pp. 2381-83, App. K, pp. 79a-80a.) The record is devoid of a factual basis to support that assumption. This is borne out by the cross-examination of the economist, during which he admitted he had no information whatsoever concerning the value of found. (R. Vol. 9, pp. 2399-2400, App. K, p. 81a.) Furthermore, there is no evidence from which the court could infer the appropriate amount of found. Thus, there is no evidence to support counsel's assumptions of the value of found at $10.00 per day, and the award of found, past and future, must be disallowed.

In *Stiles,* the Louisiana Supreme Court reversed the court of appeal's disallowance of damages for future medical expenses because plaintiff failed to produce any evidence to support the amount of that award. That Court concluded plaintiff could establish future medical expenses through *evidence* of past medical expenses. *Stiles,* 597 So.2d at 1013.

In *Jordan,* the Louisiana Supreme Court reversed the court of appeal, which had disallowed any recovery for economic losses because plaintiff failed to produce his tax returns or other documentary evidence of his earnings. Plaintiff, his wife and his employer *testified* concerning his approximate earnings. That court concluded that *testimony* concerning one's economic losses, if credible, was substantial *evidence* to support the award for economic losses. *Jordan,* 245 So.2d at 154-55.

In contrast, plaintiff here presented absolutely no evidence to support the award of found based on $10.00 a day for food and clothing. His counsel merely suggested that a $10.00 per day rate be assumed by his economist; this suggestion was not supported by any evidence whatsoever. The Louisiana Supreme Court's decisions in *Stiles, supra,* and *Jordan, supra,* clearly are distinguishable — and in fact support the rejection of any award for found in this case.

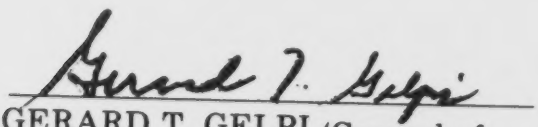
MOC respectfully submits that the Louisiana Supreme Court's decision to reinstate the award of found based upon non-existent evidence goes far beyond the leeway presented by the rationale of *Stiles* and *Jordan* and contravenes the general maritime law. In effect, the Louis-

iana Supreme Court, in this case, has elevated the suggestion and argument of counsel to evidence. Just as plaintiff must establish by a preponderance of the evidence the Jones Act negligence and the unseaworthiness of the vessel to establish defendants' liability, plaintiff likewise bears the burden of proof in establishing by competent evidence his damages caused by the alleged negligence and unseaworthiness. In the absence of *any* evidence concerning the value of meals and clothing provided to Youn by MOC while he was aboard the vessel, and if and for how long in the future he would have received these benefits, this Court should grant *certiorari* to correct the decision of the Louisiana Supreme Court and affirm the judgment of the Louisiana Fifth Circuit denying recovery for loss of found.

CONCLUSION

For the foregoing reasons, Atlantia Tanker Corporation and Maritime Overseas Corporation respectfully submit this Honorable Court grant a writ of *certiorari* to the Louisiana Supreme Court limited to the issues of the double recovery of pain and suffering, the award of prejudgment interest and the reinstatement of the award for loss of found.

Respectfully submitted,



GERARD T. GELPI (Counsel of Record)
C. GORDON STARLING, JR
G. BEAUREGARD GELPI

and

Gelpi, Sullivan, Carroll & Gibbens
430 Notre Dame Street
New Orleans, Louisiana 70130-3610
Telephone (504) 524-9714
Attorneys for petitioners, Maritime Overseas Corporation and Atlantia Tanker Corporation

CERTIFICATE OF SERVICE

I do hereby certify that on this 10th of December, 1993, a copy of the foregoing pleading has been served upon all counsel for all parties to this proceeding, by mailing same United States mail, properly addressed, and first class postage prepaid.